PUBLIC PROSECUTOR

v.

TAN LEE KOK

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
ABU MANSOR ALI JCA
HAIDAR MOHD NOOR JCA
[CRIMINAL APPEAL NO: MRRJ-A-05-99-95]
26 FEBRUARY 1998

CRIMINAL PROCEDURE: *Forfeiture - Dangerous Drugs - Property seized under s. 25 Dangerous Drugs (Forfeiture of Property) Act 1988 - Respondent claiming to be lawfully entitled to property - Reference of claim to Sessions Court under s. 32 of Act - Proper procedure - Whether s. 32 ambiguous - Whether Public Prosecutor duty bound to apply procedure as prescribed in s. 8 of Act - Role of Public Prosecutor under s. 32 - Whether to merely forward reference to Sessions Court - Dangerous Drugs (Forfeiture of Property) Act 1988, ss. 8, 25, 32*

INTERPRETATION: *Dangerous Drugs (Forfeiture of Property) Act 1988 - Forfeiture of property - Proper procedure - Whether Act providing a two-pronged procedure for forfeiture of seized property - Sections 8 and 32 thereof - Whether distinct and separate in purport*

The respondent in this case claimed that he was lawfully entitled to the property which the police had seized pursuant to s. 25 of the Dangerous Drugs (Forfeiture of Property) Act 1988 ('the Act'). The police had thereafter referred the matter to the Sessions Court, in compliance purportedly of s. 32 of the Act, and the property, in consequence, was ordered forfeited by the court. On appeal, however, the High Court ruled that: (i) s. 32 of the Act was unclear as to the procedure to be adopted by the Public Prosecutor in respect of an application made thereunder in the Sessions Court (ii) the procedure as contained in s. 8 of the Act for applications to the High Court ought to have been adopted, and since that was not done, it was wrong of the Sessions judge to have forfeited the property. Consequently, the property was ordered to be released. The Public Prosecutor appealed and before the learned appellate judges, a question *inter alia* arose as to whether the purports of ss. 8 and 32 aforesaid were distinct and separate, such that, for claims under s. 32 of the Act, there was no need to allude to the procedures under s. 8 thereof.

Held:
Per Shaik Daud Ismail JCA

[1] The provisions of ss. 8 and 32 of the Act are distinct and separate. Each section could and should stand on its own.

[2] Reading the Act as a whole, once property has been seized, the scheme of the Act provides a two pronged method or procedure for such seized property to be forfeited or returned. Thus, if the Public Prosecutor requires the said property to be forfeited, without waiting for anyone to make a claim, he could proceed by making the elaborate application under s. 8 of the Act to the High Court. It is only under this section that the Public Prosecutor is required to make an application. If, however, there is a claim in writing by anyone to the property within three months of its seizure, s. 32(2) makes it incumbent for the Public Prosecutor to refer such claim to the Sessions Court for its decision. Section 32 does not place any burden on the Public Prosecutor to satisfy the court that the seizure was proper, or that the property ought to be forfeited. The law, on the contrary, places a burden on the person who made the claim to answer the summons. Section 32 therefore places no burden on the Public Prosecutor to prove anything. Under s. 32 the role of the Public Prosecutor is only to forward the claim.

[3] The learned judge fell into error when he referred to the 'application' by the Public Prosecutor under s. 32 of the Act. Nowhere in s. 32 of the Act is mentioned any application by the Public Prosecutor. If there is any application at all, it would be one under s. 32(1)(c) by any person claiming to be lawfully entitled to such seized property. When such a claim is made the Public Prosecutor is never required to make an application to the Sessions Court. The Public Prosecutor is merely required to refer such application to the Sessions Court.

[3a] Section 8 also differs from s. 32 in that it refers to holders of properties of a liable person whereas s. 32 does not confine itself to such holders but refers to any property which has been seized. Section 32, thus, applies to any seized property, such as under s. 25 of the Act. Having seized such properties, and if no prosecution is instituted (s. 32(1)(a)) or if no proceedings commenced by the Public Prosecutor, such as under s. 8 (s. 32(1)(b)), and no claim is made by anyone within a period of 3 months (s. 32(1)(c)), then the seized property stands forfeited after the expiration of the said three months.

[4] Since the proceedings under ss. 8 and 32 are separate and distinct, there is no need to allude to the procedures under s. 8 for claims under s. 32 of the Act. The learned judge had therefore erred in coming to the conclusion that the procedure in s. 32 of the Act is unclear, and that, for claims under s. 32 the court is required to adopt the procedures under s. 8 of the Act.

[5] The Act does not provide a specific manner for a reference under s. 32 (2). That being so, a simple letter to that effect by the Public Prosecutor or his deputy would suffice. There is no neccecity to file an affidavit. It is however incumbent on the Public Prosecutor or his deputy to make the reference as the law make no mention of any other person to make such a reference.

[5a] In the present case, no such reference was made by the Public Prosecutor or his deputy. What was filed was an affidavit by the police and this contravenes the provisions of the law. Be that as it may, since the matter was before the Sessions Court, and since that court has jurisdiction to hear the reference, and has taken cognisance of and acted upon it, such a failure has not vitiated the reference.

[Appeal allowed; order of court below set aside.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Responden dalam kes ini menuntut bahawa beliau adalah secara sah berhak kepada harta yang dirampas oleh polis di bawah s. 25 Akta Dadah Berbahaya (Perlucuthakan Harta) 1988 ('Akta'). Pihak polis, dengan tujuan yang kelihatannya untuk mematuhi s. 32 Akta, selepas itu merujuk perkara tersebut kepada Mahkamah Sesyen, dan akibatnya harta berkenaan diperintah oleh mahkamah supaya dilucuthak. Bagaimanapun, atas rayuan, Mahkamah Tinggi memutuskan bahawa: (i) s. 32 Akta adalah kabur dari segi prosedur yang perlu diikuti oleh Pendakwa Raya berhubung permohonan yang dibuat di bawahnya dalam Mahkamah Sesyen; (ii) prosedur yang kena dipakai adalah prosedur seperti yang terkandung dalam s. 8 Akta untuk pemakaian di dalam Mahkamah Tinggi, dan kerana ini tidak dilakukan, maka ianya silap bagi Hakim Sesyen untuk melucuthak harta. Harta berkenaan, dengan itu, diperintah supaya dipulangkan. Pendakwa Raya merayu dan dihadapan hakim-hakim rayuan yang bijaksana, persoalan berbangkit, antara lainnya, samada maksud ss. 8 dan 32 di atas adalah jelas berbeza dan berasingan, dan kerana itu tidak wujud keperluan untuk merujuk kepada prosedur di bawah s. 8 bagi tuntutan yang dibuat di bawah s. 32 Akta.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Peruntukan-peruntukan ss. 8 dan 32 adalah jelas berbeza dan berasingan. Masing-masing mampu dan patut berdiri secara bersendirian.

[2] Membaca Akta secara keseluruhan, sebaik saja harta dirampas, satu skim serampang dua mata telah dikemukakan oleh Akta bagi perlucuthakan atau pemulangan harta yang dirampas. Maka itu, jika Pendakwa Raya mahukan supaya harta tersebut dilucuthak, beliau boleh, tanpa perlu menunggu tuntutan dibuat oleh mana-mana orang, membuat permohonan yang agak terperinci kepada Mahkamah Tinggi di bawah s. 8 Akta. Ianya hanya di bawah seksyen ini di mana Pendakwa Raya dikehendakki membuat suatu permohonan. Bagaimanapun, jika suatu tuntutan bertulis dibuat oleh seseorang dalam masa tiga bulan rampasan dibuat, maka Pendakwa Raya hendaklah, menurut s. 32(2), merujuk tuntutan tersebut kepada Mahkamah Sesyen untuk keputusan. Seksyen 32 tidak meletakkan apa-apa beban ke atas Pendakwa Raya untuk membuktikan kepada mahkamah bahawa rampasan adalah teratur, ataupun bahawa harta tersebut sememangnya patut dilucuthak. Undang-undang, sebaliknya, meletakkan beban ke atas orang yang membuat tuntutan untuk menjawab saman. Seksyen 32 dengan itu tidak memerlukan Pendakwa Raya untuk membuktikan apa-apa. Di bawah s. 32, peranan Pendakwa raya hanyalah untuk merujuk permohonan kepada Mahkamah Sesyen.

[3] Hakim yang bijaksana tersilap bilamana beliau merujuk kepada 'permohonan' oleh Pendakwa Raya di bawah s. 32 Akta. Tidak terdapat di mana-mana pun dalam s. 32 yang menyebut permohonan oleh Pendakwa Raya. Jikapun ada permohonan, ianya adalah permohonan di bawah s. 32(1)(c) oleh orang yang menuntut bahawa dia berhak secara sahnya kepada harta yang dirampas itu. Di mana tuntutan sedemikian dibuat, Pendakwa Raya tidak dituntut supaya membuat permohonan kepada Mahkamah Sesyen. Pendakwa Raya cuma dituntut supaya merujuk permohonan tersebut kepada Mahkamah Sesyen.

[3a] Seksyen 8 Akta juga berbeza dari s. 32 dalam ertikata ianya merujuk kepada pemegang harta orang yang membuat kesalahan, sedangkan s. 32 tidak dihadkan sebegitu tetapi merujuk kepada mana-mana harta yang dirampas. Seksyen 32, oleh yang demikian, terpakai kepada mana-mana sahaja harta yang dirampas, seperti di bawah s. 25 Akta. Setelah merampas harta sedemikian, dan jika tiada pendakwaan dibuat (s. 32(1)(a)), atau jika tiada prosiding dimulakan oleh Pendakwa Raya

di bawah s. 8 (s. 32(1)(b), dan tiada tuntutan dibuat oleh mana-mana orang dalam masa tiga bulan (s. 32(1)(c), maka harta yang dirampas menjadi terlucuthak selepas berakhirnya tempoh tiga bulan tersebut.

[4] Oleh kerana prosiding di bawah s. 8 dan 32 jelas berbeza dan berasingan, tidak ada keperluan untuk merujuk kepada prosedur di bawah s. 8 bagi tuntutan di bawah s. 32. Hakim yang bijaksana, kerana itu, adalah silap apabila merumuskan bahawa prosedur di bawah s. 32 adalah kabur, dan bahawa, untuk tuntutan di bawah s. 32 mahkamah hendaklah menggunapakai prosedur yang tertera dalam s. 8 Akta.

[5] Akta tidak menganjurkan cara spesifik bagaimana rujukan di bawah s. 32 harus dibuat. Dengan sebab itu, suatu surat biasa yang mengandungi tujuan tersebut yang diutus oleh Pendakwa Raya atau timbalannya sudah mencukupi. Pemfailan afidavit adalah tidak perlu. Bagaimanapun, ianya wajib bagi Pendakwa Raya atau timbalannya untuk membuat rujukan kerana undang-undang tidak menyebut mana-mana orang lain yang boleh berbuat demikian.

[5a] Dalam kes semasa, tiada rujukan dibuat oleh Pendakwa Raya atau timbalannya. Apa yang difailkan hanyalah afidavit oleh pihak polis dan ini bertentangan dengan peruntukan undang-undang. Namun begitu, oleh kerana halperkara ini telah berada di hadapan Mahkamah Sesyen, dan oleh kerana mahkamah tersebut mempunyai bidangkuasa untuk mendengar rujukan itu, dan telah mengambil tahu tentangnya dan bertindak atasnya, maka kegagalan tersebut tidak memudaratkan rujukan.

[Rayuan dibenarkan; perintah mahkamah di bawah diketepikan.]

Legislation referred to:

Dangerous Drugs (Forfeiture of Property) Act 1988, ss. 8(2)(c), 25, 32(1)(b), (c), (2), (3),

Evidence Act 1950, s. 101

[Appeal from High Court, Taiping; Criminal Appeal No: 52-9-95]

For the appellant - Mohd Yusof Hj Zainal Abiden
For the respondent - Tan Lee Kok

Reported by WA Sharif

JUDGMENT

Shaik Daud Ismail JCA:

This is an appeal against the decision of the Taiping High Court which had ordered the release of property seized by the police under s. 25 of the Dangerous Drugs (Forfeiture of Property) Act 1988 (hereinafter referred to as the Act). The Taiping Sessions Court had earlier ordered the seized property to be forfeited.

This appeal, together with MRRJ A-05-98-95, revolves around the interpretation of s. 32 of the Act. The learned judge was of the view that since the provisions of s. 32 of the Act are unclear as to the procedure to be adopted by the Public Prosecutor in application under that section, in the Sessions Court, the procedure contained in s. 8 of the Act for applications to the High Court should have been adopted. Since this was not done, the Court held that forfeiture ought not to be ordered as it violated art. 13(1) of the Constitution. This article provides that no person shall be deprived of property save in accordance with law.

We find it necessary to reproduce the provisions of s. 32 and s. 8 of the Act.

> 32 (1) Where any property has been seized under this Act, other than under or by virtue of Part VII, and:
>
> (a) no prosecution for any offence under any law is instituted with regard to such property;
>
> (b) no proceedings are commenced by the Public Prosecutor for the forfeiture of such property under Part III; and
>
> (c) no claim in writing is made by any person that he is lawfiilly entitled to such property and that it is not liable to forfeiture under this Act or under the Dangerous Drugs Act 1952,
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> within three months from the date of its seizure, the property shall become forfeited immediately upon the expiration of the said period of three months
>
> (2) Where within three months from the date of the seizure of any property under this Act, a claim in writing is made thereto by any person in the terms mentioned in para. (c) of sub-s. (1), the Public Prosecutor shall within fourteen days after expiry of the said period of three months, **refer such claim** to a Sessions Court for its decision.

(3) The Sessions Court to which **a claim is referred** under sub-s. (2) shall issue a summons requiring the person claiming that he is lawfiilly entitled to the property, and the person from whom it was seized, if he and his whereabouts are known, to appear before the Court and upon such appearance, upon due service of such summons being proved, the Sessions Court shall proceed to the examination of the matter and if satisfied that no offence under this Act or under the Dangerous Drugs Act 1952 has been committed in respect of the property claimed and that such property is not illegal property, shall order the same to be released to the person claiming the same upon proof that he is lawfillly entitled thereto, and shall, in any other case, order the property forfeited.

(4) The provisions of this section shall be without prejudice to the power of a police officer to release from seizure any property under s. 31.

(5) Where property has been forfeited under sub-s. (1), it shall not be a bar to any prosecution for an offence under any law being instituted in respect of such property at any time thereafter.

Now s. 8 provides:

8(1). If the Public Prosecutor has reason to believe that any person is a liable person **he may apply** *ex parte* to the High Court for an order of forfeiture of all the properties of which such person is a holder and which the Public Prosecutor has reason to believe are illegal properties.

(2). **The application,** supported by an affidavit or affidavits, shall -

(a) identify the liable person to be proceeded against, state his address of residence or business, if known, and other relevant particulars, which are known;

(b) state the grounds on which he is a liable person;

(c) identify the properties to be forfeited, set out their estimated value, and, if known, their location; and

(d) state any other matter, circumstances or information which, in the opinion of the Public Prosecutor, is relevant to the application.

(3). An application under sub-s. (1) shall be made by filing the same with the Registrar of the High Court who shall thereupon immediately fix a date for its hearing before the High Court.

(4) ... (Subsection (4) is not relevant for the purpose of this Appeal).

Section 9 of the Act then provides what the High Court should do once it is satisfied that the application by the Public Prosecutor is made in accordance with the requirements of s. 8. The court shall then issue a notice upon the liable person to show cause why all or any of the properties identified in s. 8(2)(c), should not be forfeited.

As can be seen the two sections, ss. 8 and 32 are distinct and separate provisions from each other. Each section could and should stand on its own. On our reading of the learned judges's grounds of judgment, we feel that the learned judge fell into error when he was referring to the application by the Public Prosecutor under s. 32 of the Act. No where in s. 32 of the Act is mentioned any application by the Public Prosecutor. If there is any application at all it would be one under s. 32(1)(c) by any person claiming to be lawfully entitled to such seized property. When such a claim is made the Public Prosecutor is never required to make an application to the Sessions Court. The Public Prosecutor is merely required to refer such application to the Sessions Court. Furthermore, s. 32 of the Act refers to properties already seized by the police under s. 25 of the Act, as the case in the instant appeal. By sub-s. (1)(b) of s. 32 it also refers to properties having been seized but no proceedings are commenced by the Public Prosecutor under Part III, and proceedings under s. 8 comes under Part III of the Act. Section 25 empowers a senior police officer to seize any movable property suspected to be the subject matter of an offence under the Act, or which has been used for the commission of that offence, or illegal property. Section 2 of the Act provides an extensive definition of illegal property.

On our reading of the Act as a whole, we are of the view that once property has been seized, the scheme of the Act provides a two pronged method or procedure for such seized property to be forfeited or returned. If the Public Prosecutor requires the said property to be forfeited, without waiting for anyone to make a claim, he could proceed by making the elaborate application under s. 8 of the Act. It is only under this section that a Public Prosecutor is required to make an application. Section 32 of the Act makes no such provision. In fact, it is clear from the provision of s. 32 that there is no necessity for the Public Prosecutor to make such an application for forfeiture, as sub-s. (1) provides that if no claim is made within three months by anyone that he is lawfiilly entitled to such property, the "property shall become forfeited immediately upon the expiration of the said period of three months." It is clear that if no claim is made within three months forfeiture is in fact automatic. Therefore, we hold that under s. 32 there is no provision for the Public Prosecutor to make or file an application for forfeiture. Another distinction is that s. 8 refers to holders of properties of a liable person and a liable person is defined in s. 2 of the Act, whereas s. 32 does not confine to holders of properties of a liable person but refers to any property which has been seized.

Looking at both the provisions of ss. 8 and 32 it can be seen that the law places a high burden on the Public Prosecutor if he requires the court to forfeit properties held by a liable person. Such an application can only be made in the High Court. He has first to make an *ex parte* application (s. 8(1)) supported by affidavit identifying the liable person, the grounds on which that person is a liable person, identifying the property or properties to be forfeited and give any other relevant information (s. 8(2)). Such an application shall be filed with the registrar of the High Court (s. 8(3)). Section 9 then provides for the *ex parte* application to be heard and upon the High Court being satisfied that all the requirements of s. 8 has been fulfilled, the court would then issue a show cause letter to the liable person to show cause why all or any of the properties identified should not be forfeited.

As for s. 32 of the Act, it applies to any property seized, such as under s. 25 of the Act. The seizure in the present case is under s. 25 of the Act. Having seized such properties, and if no prosecution is instituted (s. 32(1)(a)) or if no proceedings commenced by the Public Prosecutor, such as under s. 8 (s. 32(1)(b)) and no claim is made by anyone within a period of three months, (s. 32(1)(c)) then the seized property or properties stands forfeited after the expiration of the said three months.

If within the three months from the date of the seizure, a claim in writing is made by anyone as in the case in the present appeal, the Public Prosecutor is required within fourteen days after the expiry of the three months, to refer such claim to the Sessions Court for its decision (s. 32(2)). Unlike the provisions under s. 8, no application need be made by anyone in the Sessions Court, nor is the Sessions Court required to be satisfied that any provisions has been complied with except perhaps that the claim is made in writing within three months from the date of the seizure. Upon being referred to under s. 32(2), then pursuant to s. 32(3), the Sessions Court is required to issue a summons to the person claiming and shall proceed to the examination of the matter. From this it can be seen that the law does not place the burden on the Public Prosecutor to satisfy the court that the seizure was proper, or that the property ought to be forfeited, on the contrary the law places a burden on the person who made the claim to answer the summons. Section 32(3) places the burden upon the person making the claim "upon proof that he is lawfully entitled thereto." Section 32, therefore, places no burden on the Public Prosecutor to proof anything. It merely places the burden to refer the claim to the Sessions Court. Therefore, under s. 32, the role of the Public Prosecutor is merely to forward the claim and as has been well put by the Deputy Public Prosecutor, the role of the Public Prosecutor is that of a "forwarding agent". In fact, the procedure both in s. 8 and in s. 32 is consistent with s. 101 of

the Evidence Act 1950, which provides that the burden of proof is on the person who asserts a thing. Under s. 8 since it is the Public Prosecutor who asserts that the property ought to be forfeited, the burden is therefore, on him, whereas under s. 32 the burden would be on the claimant who asserts that he is lawfully entitled to the property.

Therefore, the proceedings under ss. 8 and 32 of the Act are separate and distinct. Each section stands on its own and there is no need to allude to the procedures under s. 8 for claims under s. 32 of the Act.

We are, therefore, of the view that the learned judge erred in coming to the conclusion that the procedure in s. 32 of the Act is unclear and that for claims under s. 32 the Court is required to adopt the procedures under s. 8.

Before leaving the matter, we would like to touch on the procedure to be adopted for a reference under s. 32(2) of the Act. The Act does not provide for a specific manner or a specific format for such reference to be made. In view of that we are of the view that a simple letter to that effect from the Public Prosecutor or his deputy, would suffice. There is no necessity to file any affidavit. We would like to emphasise that it is encumbent on the Public Prosecutor, or his deputy, to make the reference as the law make no mention any other person or body to make such a reference. In the present case, however, we noticed from the records of appeal, that no such reference was in fact made by the Public Prosecutor or his deputy. What was filed was an affidavit by the police. How this affidavit was forwarded to the Court was not recorded but the Learned Deputy Public Prosecutor, from the bar, informed us that it was sent with a covering letter signed by a Deputy Public Prosecutor. We are of the view that this is not in accordance with the provisions of the law. Be that as it may, as the matter was before the Sessions Court, and that court has jurisdiction to hear the reference, such a failure has not vitiated the reference, as the court had taken cognisance of the reference and acted upon it by issuing a summons to the claimant to attend court to be examined. It is trite law that once a matter is before the court, and the court has jurisdiction to hear the matter, the court ought not to concern itself with the manner in which it comes before the court.

For the above reasons, we allow the appeal and set aside the order of the learned judge. As the prosecution failed to apply for a stay of execution of the learned Judge's order, we are informed that the properties ordered by the High Court to be released to the respondent has dissipated and also that the respondent in appeal No. A-05-98-95 has passed away, we see no purpose to order the properties to be returned. Therefore, we make no order on the properties.

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